

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



74-1193

B  
P/S

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

DOCKET NO. 74-1193

---

UNITED STATES OF AMERICA  
PLAINTIFF-APPELLEE

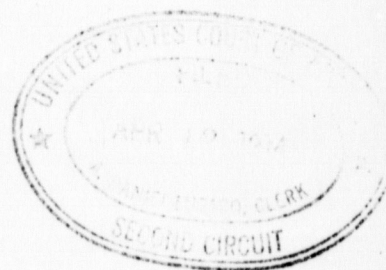
VS.

CHARLES HARRIS  
DEFENDANT-APPELLANT

---

BRIEF OF DEFENDANT - APPELLANT  
CHARLES HARRIS

---



THOMAS D. CLIFFORD  
COUNSEL FOR DEFENDANT - APPELLANT  
770 CHAPEL STREET  
NEW HAVEN, CONNECTICUT

## TABLE OF CONTENTS

	PAGE
CASES CITED.....	1
STATEMENT OF THE CASE.....	4
STATUTES INVOLVED.....	7
QUESTIONS PRESENTED.....	10
THE FACTS.....	11
ARGUMENT.....	17
I.    THE COURT ERRED IN ADMITTING THE ADMISSION AND STATEMENT OF DEFENDANT WHEN SUCH ADMISSION AND STATEMENT WERE THE FRUIT OF AN ILLEGAL ARREST.....	17
II.   CONTINUED QUESTIONS BY PROSECUTOR ON EVIDENCE CRUCIAL TO GOVERNMENT'S CASE, AFTER SUSTAINED OBJECTION AND CAUTION, DENIED DEFENDANT A FAIR TRIAL.....	31
CONCLUSION.....	36

# CASES CITED

	PAGE
<u>Burke v. N.Y. N.H. &amp; H. RR</u> , 267	
F.2d 894,899 (2d Cir. 1959).....	20
<u>Davis v. United States</u> , 328 U.S.	
582, 610 n.4 (1946).....	26
<u>Draper v. United States</u> , 358 U.S.	
307,310 (1959).....	21
<u>Gambino v. United States</u> , 275 U.S.	
310 (1927).....	26
<u>Hale v. Henderson</u> , 400 F.2d 655,	
657 (6th Cir. 1968).....	30
<u>Hale v. Henderson</u> , 485 F.2d 266,268	
(6th Cir. 1973).....	30
<u>Lutwak v. United States</u> , 344 U.S. 604	
619 (1953).....	35
<u>Marsh v. United States</u> , 29 F.2d 172	
(2d Cir. 1928).....	23
<u>Raffone v. Adams</u> , 468 F.2d 860	
(2d Cir. 1972).....	20
<u>Silverthorne v. United States</u> , 251 U.S.	
385,392.....	28

	PAGE
<u>Sims v. Smith</u> , 115 Conn. 279,283,161	
A. 2d 239,240 (1932).....	20
<u>State v. Carroll</u> , 131 Conn. 224,229-30	
(1944).....	20
<u>State v. Raffone</u> , 161 Conn. 117	
(1971).....	20
<u>United States v. Cassity</u> , 471 F.2d	
317 (6th Cir. 1972).....	30
<u>United States v. DiRe</u> , 332 U.S. 581,	
589 (1948).....	23
<u>United States v. DiRe</u> , 159 F.2d 818	
(2d Cir. 1947).....	24
<u>United States v. Miles</u> , 468 F.2d 482	
(3d Cir. 1972).....	18
<u>United States v. Pfingst</u> , 477 F.2d 177,	
188 (2d Cir. 1973).....	34
<u>United States v. Semensohn</u> , 421 F.2d	
1206, 1208-09 (2d Cir. 1970).....	34

	PAGE
<u>United States v. Thompson</u> , 356 F.2d 216	
(2d Cir. 1965) cert. den. 384 U.S.	
964 (1966).....	21
<u>Whitely v. Warden</u> , 401 U.S. 560	
(1971).....	18
<u>Wong Sun v. United States</u> , 371 U.S.	
471, 488 (1963).....	29

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

DOCKET NO. 74-1193

---

UNITED STATES OF AMERICA  
PLAINTIFF-APPELLEE

V.

CHARLES HARRIS  
DEFENDANT-APPELLANT

---

BRIEF OF DEFENDANT-APPELLANT

---

STATEMENT OF THE CASE

In this case defendant was charged originally in a three count indictment with three co-defendants. Two co-defendants (Earl Harris and Carl Grey) were severed pre-trial. Defendant was charged with the usual bank

robbery trilogy - 18 U.S.C. §2113 (a), 18 U.S.C. §2113 (b) and 18 U.S.C. §2113 (d).

Defendant pleaded not guilty to each count of the indictment. In addition to other motions, defendant filed a pre-trial motion to suppress directed at the alleged admissions and statement of defendant. The hearing on the motion to suppress was deferred to the time of trial.

On October 24, 1973 a jury trial commenced before Judge Newman. During the jury trial, outside the presence of the jury, a hearing was held on defendant's motion to suppress and motion was denied. The court, likewise, denied defendant's motion for judgment of acquittal at the end of the government's case and at the conclusion of all the evidence.

Defendant testified on his own behalf in both the motion to suppress hearing and in the trial itself.

On November 16, 1973, after approximately 11 1/2 hours of deliberations, the jury returned with a written verdict of guilty as to defendant Harris on all counts.

On February 6, 1974 court imposed a sentence of imprisonment of five years as a general sentence to be

served concurrent on all three counts.

Timely notice of appeal was filed on behalf of  
the defendant.

## STATUTES INVOLVED

18 U.S.C §2113 Bank robbery and incidental crimes.

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property, or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association....

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both....

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both.

18 U.S.C. §3041. Power of courts and magistrates.

For any offense against the United States, the offender may, by any justice or judge of the United States, or by any United States magistrate, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and at the expense of the United States, be arrested and imprisoned or released as provided in chapter 207 of this title, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the office of the clerk of such court, together with the recognizances of the witnesses for their appearances to testify in the case.

A United States judge or magistrate shall proceed under this section according to rules promulgated by the Supreme Court of the United States. Any state judge or magistrate acting hereunder may proceed according to the usual mode of procedure of his state but his acts and orders shall have no effect beyond determining to hold the prisoner

for trial or to discharge him from arrest.

Section 6-49, Connecticut General Statutes

Arrest without warrant. Pursuit outside precincts. Sheriffs, deputy sheriffs, county detectives, constables, borough bailiffs, police officers, special protectors of fish and game and railroad and steamboat policemen, in their respective precincts, shall arrest, without previous complaint and warrant, any person for any offense in their jurisdiction, when such person is taken or apprehended in the act or on the speedy information of others, and members of the state police department or of an organized local police department or county detectives shall arrest, without previous complaint and warrant, any person who such officer has reasonable grounds to believe has committed or is committing a felony. Members of an organized local police department when in immediate pursuit of one who may be arrested under the provisions of this section, are authorized to pursue such offender outside of their respective precincts into any part of the state in order to effect the arrest. Such person may then be returned in the custody of such officer to the precinct in which the offense was committed. Any person so arrested shall be presented with reasonable promptness before proper authority.

QUESTIONS PRESENTED

1. DID THE COURT ERR IN ADMITTING THE ALLEGED ADMISSIONS AND STATEMENT OF DEFENDANT IN VIOLATION OF DEFENDANT IN VIOLATION OF THE FOURTH AMENDMENT WHEN SUCH ADMISSIONS AND CONFESSION WERE THE FRUIT OF AN ILLEGAL ARREST?
2. DID THE COURT ERR IN DENYING DEFENDANT'S MOTION FOR MISTRIAL AFTER THE PROSECUTOR, SUBSEQUENT TO A SUSTAINED OBJECTION AND ADMONITION OF THE COURT, PURSUED THE SAME INQUIRY BEFORE THE JURY ON AN ISSUE CRITICAL TO GOVERNMENT'S CASE THUS DEPRIVING DEFENDANT OF A FAIR TRIAL?

### THE FACTS

On November 6, 1972 the Derby Savings Bank was robbed by three persons. A bank surveillance photo (Ex. 8), offered into evidence, tended to establish the number of participants in the robbery.

On November 15, 1972 the defendant, Charles Harris, at the request or upon information from his family, placed a phone call to Odell Cohens, a police officer of the City of New Haven (T. 711-716). That call was placed by the defendant on a private number connected to the New Haven detective bureau where Cohens was then employed and took place at about 9:00 p.m. There is a dispute as to the number of such phone calls, Cohens claiming two (T. 721-22) and Harris claiming one (T. 613). Also in dispute is the content of the phone call or calls in one crucial respect. Cohens claimed that Harris said "I know, it was a stupid thing we did" (T. 716) although on cross-examination Cohens stated that the purpose of the call was to persuade Harris to surrender (T. 734) and that he had previously testified (Motion to Suppress hearing (T. 562)) that the statement by Harris was that it was a stupid thing they did (T. 737). Cohens did not make

any notes of the phone conversation (T. 735) and when calling the FBI to indicate that Harris had contacted him, Cohens never referred to the above-claimed admission. (T. 735). As a matter of fact, Cohens never told any federal authorities about these claimed admissions until shortly before trial (T. 744).

Cohens himself, a day after the robbery, commenced his own investigation by contacting a member of the Harris family (T. 711). From November 6, 1972 to November 16, 1972, Cohens knew that no city or state arrest warrants had been issued for Charles Harris (T. 574). He did know that a federal arrest warrant, issued to the FBI, was in existence and a copy had been sent to the New Haven detective bureau although not to Cohens personally (T. 572-73). On the basis of the phone call or phone calls from Harris, Cohens learned that the defendant would voluntarily arrive in New Haven at the Trailways Bus Terminal in New Haven before 3:00 p.m. on November 16, 1972 (T. 722).

On November 16, 1972 Cohens reported to work that morning and waited at the Trailways Terminal until such time as he was called away on another police business (T. 723) until 11:00 or 11:30 when he returned to the bus terminal (T. 725). At that time, he observed the defendant inside the

terminal, identified himself as a police officer; the defendant acknowledged that he was Charles Harris (T. 725); Cohens then exhibited his badge, advised the defendant that he was under arrest and, according to Cohens, Harris was advised of his constitutional rights (T. 726). Harris testified to the arrest but denied any advice of rights by Cohens at the time of arrest or subsequently (T. 614-15). The arrest of Harris took place shortly before 12:00 noon.

After the arrest, Harris was placed in Cohens' automobile and proceeded to the detective bureau. Cohens testified that within a span of 22 minutes, he advised Harris of his constitutional rights on three separate occasions (T. 579); that, although it is standard procedure in the New Haven Police Department to have Miranda warning waivers signed by the defendant, he did not do so in the case of Harris (T. 575). Cohens claimed that after such warnings, Harris, while in Cohens' automobile stated that it was a stupid thing they had done (T. 562), but meaning "we had done" according to Cohens (T. 568). Cohens did not make any notes of this claimed statement by Harris (T. 580). Nor did Cohens inform the FBI of the claimed admissions of Harris while he was in Cohens' car (T. 581-82). The first person to whom Cohens made these claimed admissions of Harris was to the prosecutor preparing for trial (T. 583-84; 744).

Almost immediately upon arriving at the detective bureau, Cohens observed the FBI agents coming into the detective bureau (T. 729). The FBI agents, upon meeting Harris, placed him under arrest (T. 588), although Agent Townsend knew that Cohens had previously arrested the defendant (T. 595). Cohens did not advise the FBI Agents of prior "admissions" by Harris (T. 596) nor were the agents advised by Cohens that he had previously administered Miranda warnings to Harris (T. 596). The interview by the FBI with Harris began in the New Haven Police Department at 12:28 p.m. (T. 597) some 30 minutes after Harris' arrest by Odell Cohens. A waiver of rights was executed by Harris (Ex. 25) and a statement, (Ex. 26) was taken.

The defendant was turned over to the FBI agents at the New Haven Police Department since they usually handle the investigation (T. 732). Cohens claimed that he did not take a written waiver of rights since this was an FBI investigation and not a New Haven Police Department investigation (T. 741). His police report was not complete because he was only assisting the FBI. (T. 753).

Upon cross examination, Cohens denied ever signing, while engaged in duties as a police officer, an affidavit knowing that affidavit to be false (T. 746-47). Upon

direct examination, when called as a witness for the defendant for the purposes of impeaching his prior testimony, Cohens admitted to signing, after being sworn, a false affidavit for a search warrant in a prior, unrelated state prosecution (T. 1029-39).

The government's case against defendant Harris was based essentially upon the bank surveillance photo and defendant's confession. The prosecutor, after a prior bench conference calling attention to the matter of leading questions and what defense counsel observed as a pattern (T. 257-58), called Gilbert Robinson to testify. After establishing that Robinson was acquainted with Earl Harris and Charles Harris since 1967 (T. 391), after sustained objections on various leading questions (T. 414-15), the prosecutor offered the bank surveillance photo to the witness for the purpose of identifying the persons in the photograph. After objection and after notice by the court, the prosecutor again offered the photograph for the identification of two persons in the photograph, counsel for defendant moved for a mistrial which was denied (app. pp. 28-32). Odell Cohens, on direct examination (T. 709) was also questioned on TV and newspaper from which he recognized photos, this time referring to is as "something he had himself seen". Defense counsel objected, sustained

and an admonishment to the prosecutor about exploring  
this issue (app. pp. 37-39).

## ARGUMENT

- I. The Court Erred In Admitting The Admissions  
And Statement Of Defendant When Such Admissions  
And Statement Were The Fruit Of An Illegal  
Arrest.

Defendant, among other grounds, moved to suppress the admissions and confession of the defendant on the ground that the arrest of defendant by Odell Cohens, a city detective, some 10 days after the offense and without a state warrant, was illegal and that the admission and statement of defendant subsequent to the Cohens arrest were tainted as a result of the illegal arrest.

Judge Newman, in his oral decision denying defendant's motion (app. p.13 ), set forth the possible grounds for upholding Cohens' arrest of Harris as follows:

"[T]he state officer could arrest without a warrant because he had probable cause to believe a federal felony had been committed. It may be under (18 U.S.C. §3041) that his authority extended to actually executing the federal warrant, and it may also be that he had authority as a matter of state law to

arrest without a warrant for probable cause to believe that a state felony had been committed." (app. p. 18)

In other words, the validity of the Harris arrest by Cohens was upheld on three alternative grounds:

(A) the state officer had the power to effect Harris' arrest under state law for a violation of a Connecticut statute; or

(B) the federal statute, 18 U.S.C. §3041, authorizes a state officer to execute a federal warrant; or

(C) the state officer is empowered under state law to arrest for a federal felony.

Each will be examined in turn.

A.

Defendant concedes two essential elements at this juncture. One, there is a state crime for armed robbery covering a bank robbery and therefore there is a dual state/federal jurisdiction on bank robbery offenses and, second, that the federal warrant for the arrest of Harris, existing at the time of Harris' arrest and known to exist by Cohens, supplied probable cause to Cohens sufficient for the arrest. Whitely v. Warden, 401 U.S. 560 (1971); United States v. Miles, 468 F.2d 482 (3d Cir. 1972). But

these concessions do not solve the arrest problem under Connecticut law. Section 6-4, Connecticut General Statutes, the general arrest statute, requires that a warrantless arrest for a felony, even if probable cause exists, must be accompanied by either apprehension in the commission of the crime or upon "speedy information". For the purposes of this discussion, leaving the federal warrant aside for the moment, it is clear that no state warrant had been issued for the arrest of Harris (T. 574). Connecticut decisional law, based upon a statutory construction and not necessarily a constitutional basis, requires an arrest warrant absent speedy information.

"The right to arrest without a warrant had its origin in the necessity of preventing the escape of offenders during the period of delay incident to the procuring of warrants. When there is time to procure a warrant without danger of the escape of the offender an arrest should not be made without it. Our statute effectuates that result by requiring a warrant except when the offender is apprehended in the act or upon speedy information, in which cases ordinarily there would be no opportunity to obtain a warrant.

Sims v. Smith, 115 Conn. 279, 283, 161  
A. 2d 239, 240 (1932); State v. Carroll,  
131 Conn. 224, 229-30 (1944); see Burke  
v. N.Y. N.H. & H. RR, 267 F.2d 894, 899  
(2d Cir. 1959); State v. Raffone, 161 Conn.  
117 (1971); Raffone v. Adams, 468 F.2d 860  
(2d Cir. 1972).

In this case, there can be no pretension that Cohens was acting upon speedy information. He had participated in the investigation one day after the robbery and nine days before the arrest. In State v. Carroll, supra, two arrests without warrant took place five and eight days after the offense was committed and those arrests were found to be illegal. There is no showing, nor can there be, of why a state warrant was not obtained. And, of course, there can be no pretense that this arrest was for a state crime to be prosecuted as such since there was an immediate delivery to the FBI without presentment before a state judge for arraignment and bail. Cohens candidly indicated that he was assisting the FBI (T. 753) and that it was their investigation (T. 741). His role, as he saw it, was in keeping with the traditional

federal pre-emption, with few exceptions, of bank robbery prosecutions in the District of Connecticut. The rapid turn-over of Harris, with a strong inference of pre-arrangement, strongly suggests no thought of a state prosecution. Compare United States v. Thompson, 356 F.2d (2d Cir. 1965) cert. den. 384 U.S. 964 (1966).

It is respectfully suggested that under Connecticut law, this alternative ground for upholding the arrest for a state crime is not valid.

B.

The second alternative ground of Judge Newman for upholding the validity of the arrest was that a state officer, pursuant to 18 U.S.C. § 3041, is empowered to execute a federal warrant.

There is no federal common law and therefore, it is respectfully suggested that the authority for the arrest must be found in some federal statute. Draper v. United States, 358 U.S. 307, 310 (1959). Certainly, 18 U.S.C. §3041 does not on its face authorize the execution of a federal warrant by a state police officer. It is fairly apparent on its face that §3041 deals with the issuance of process for the purpose of effectuating the

arrest and not the arrest itself. The specific authority to make arrests is dealt with in separate statutes, e.g. 18 U.S.C. §3050 (Bureau of Prison employees); 18 U.S.C. §3052 (FBI agents); 18 U.S.C. §3054 (wildlife violations); 18 U.S.C. §3055 (Indian liquor traffic); 18 U.S.C. §3056 (Secret Service); 18 U.S.C. §3061 (Postal inspectors); 18 U.S.C. 3654 (Probation officers).

Counsel for defendant has not been able to uncover any decisional law, one way or the other, on the authority of a state or municipal police officer to execute a federal warrant. It is clear that in this case the federal warrant was executed by FBI agents some 30 minutes after the arrest by Cohens (T. 595) even though the FBI agents knew that Cohens had made the previous arrest. It was the FBI agents who took Harris before a magistrate for arraignment and setting of bail. The facts of this case are squarely against the theory that Cohens, even in a symbolic manner, executed the federal warrant in arresting Harris. The execution of the federal warrant by Cohens was beyond his authority for Fourth Amendment purposes and, in fact, did not occur.

C.

The third alternative ground for upholding the validity of the arrest by Cohens was that the state officer was empowered under state law to arrest for a federal felony. Judge Newman, relying upon United States v. DiRe, 332 U.S. 581,589 (1948) as authority, acknowledged that DiRe is murky in its holding. The holding of DiRe, constantly and perhaps thoughtlessly repeated, is:

"We believe, however, that in the absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity."  
United States v. DiRe, supra at 589.

The ancestor of DiRe appears to be Marsh v. United States, 29 F. 2d 172 (2d Cir. 1928) which by way of dicta upholds a federal misdemeanor arrest by a state officer. Under the facts, defendant was initially validly arrested by state officers for a traffic violation with a search of the automobile incidental to that traffic arrest at which time the violation of the National Prohibition Act was uncovered.

The Court held that, under New York law, the search of the automobile was valid as being incidental to a valid state arrest under New York law. The authority of the arrest in Marsh was fundamentally bottomed on well established practice and an exhortation by the Governor that state officers enforce the National Prohibition Act.

The importance of Marsh can be seen when DiRe came before this Circuit for appellate review. United States v. DiRe, 159 F.2d 818 (2d Cir. 1947). This court, on the question of the authority of a state officer to validly arrest for a federal offense, stated:

"We shall assume, arguendo, that Gross (police detective) had authority under §177 of the New York Code of Criminal Procedure to arrest Battita and Reed (co-defendants), although the crime was not against the State of New York. (Citing Marsh)"

United States v. DiRe, 159 F.2d 818, 819  
(2d Cir. 1947)

This Circuit then proceeded to the main question presented - whether or not the city detective had probable cause to arrest. When DiRe went before the Supreme Court, the government had made an important concession in withdrawing its claim that, under the circumstances, the felony arrests were valid and limited its argument to the validity of the misdemeanor arrest. Under the facts, the city detective, accompanied by two federal agents not empowered to make an arrest, made an arrest for an on sight federal misdemeanor. Significantly, to the present case, DiRe was "booked" at the police department but the record does not indicate the nature of the offense. United States v. DiRe, supra at 589. Without exploring whether the arrest was, in fact, for a state violation, the Court, as had the Circuit Court, assumed a general state arrest statute comprehends the authority to effect an arrest for a federal offense. The decision clearly does not stand for the proposition that a state officer can execute a federal warrant. And without discussion, the decision ignores the caveat of Justice Frankfurter

in a dissenting opinion - Whether the New York detectives are authorized to make arrests for federal offenses is a debatable issue" Davis v. United States, 328 U.S. 582, 610 n.4 (1946).

The legal decisions emanating from the National Prohibition Act may not be entirely appropriate or enlightening on the question presented in this appeal. They are pre-Mapp and Elkins and it is clear that, under the law then prevailing, both Government and defense lawyers were jockeying for positions and presenting questions not pertinent today. But in terms of federal/state arrest problems, Gambino v. United States, 275 U.S. 310 (1927) may be instructive. The defendants there were arrested by state troopers for violation of the National Prohibition Act, without a parallel state violation. Of importance to the federal arrest statute under consideration in Gambino, the court held that "any officer of the law" refers only to federal officers and that the troopers were not, at the time of the arrest and seizure, agents of the United States. Gambino v. United States, supra, at 315. In language pertinent to this case the Court held the arrest illegal and stated:

"It was also shown that immediately after the arrest and seizure the defendants, their car and the liquor were, after they had been taken to the committing magistrate, turned over to the federal officers. In view of these facts, the statement, in the affidavit of one of the troopers, that at the time of the arrest and search 'there were no federal officers present, and that we were not working in conjunction with federal officers' must be taken to mean merely that the specific arrest and search was not directly participated in by any federal officer.

We are of the opinion that the admission in evidence of the liquor wrongfully seized violated rights of the defendants guaranteed by the Fourth and Fifth Amendments. The wrongful arrest, search and seizure were made solely on behalf of the United States. The evidence so secured was the foundation for the prosecution and supplied the only evidence of guilt. It is true that the troopers were not shown to have acted under

the directions of the federal officials in making the arrest and seizure. But the rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by such cooperation, as by the state officers' acting under direction of the federal officials. Compare Silverthorne v. United States, 251 U.S. 385, 392. The prosecution thereupon instituted by the federal authorities was, as conducted, in effect a ratification of the arrest, search made by the troopers on behalf of the United States. Whether the laws of the state actually imposed upon the troopers the duty of aiding the federal officials in the enforcement of the National Prohibition Act we have no occasion to enquire."

Gambino v. United States, supra at 315-16.

Assuming, under DiRe, that Cohens, a city detective, had the authority to make an arrest for a federal offense, defendant respectfully suggests that the warrantless arrest is invalid under Section 6-4, Connecticut

General Statutes, and we are back to first base, paragraph A above, since his arrest was not pursuant to a state warrant.

The arrest being invalid, for Fourth Amendment purposes, the admissions and subsequent confession of defendant were tainted by the illegal arrest and should have been suppressed. Wong Sun v. United States, 371 U.S. 471, 488 (1963). The total elapsed time between the arrest by Cohens and the interview was approximately 30 minutes; the FBI interview took place in the New Haven Police Department where Harris was brought by Cohens; there was no break in custody; the illegal arrest made possible the FBI interview. As indicated by Judge Newman, "the cat was pretty far out of the bag" before the FBI interview (T. 695). Lest one be tempted to treat the alleged Miranda warnings by Cohens as an intervening force removing the taint, it should be remembered that Cohens allegedly administered the warning three times in 22 minutes, inherently incredible testimony; that on none of the three occasions were written waivers obtained although the forms were available; that Cohens never informed the FBI of his prior warnings

to defendant all militate against the warnings having been administered or comprehended in view of the defendant's denial of such warnings by Cohens.

"In our instant case there was no break in custody (and apparently little break if any in custodial interrogation, see Hale v. Henderson, 400 F.2d 655, 657 (6th Cir. 1968)) prior to petitioner's confession. Contrary to the holding of the District Judge, we do not believe that the connection between the arrest and statement has 'become so attenuated as to dissipate the taint'. Wong Sun v. United States, supra at 491, 83 S. Ct. at 419. The confrontations which preceed the statement was made possible by and were the product of the illegal arrest."

Hale v. Henderson, 485 F.2d 266, 268 (6th Cir. 1973) (emphasis added); compare United States v. Cassity, 471 F.2d 317 (6th Cir. 1972) (26 days between arrest and interview).

II. Continued Questions by Prosecutor On  
Evidence Crucial To Government's Case,  
After Sustained Objection And Caution,  
Denied Defendant A Fair Trial.

The government's case against defendant was based essentially upon two pieces of evidence - (1) a bank surveillance photo (Ex 8) and (2) defendant's statement (Ex. 26). The government produced four bank employees present during the robbery (T. 232,250,260 and 276) and none made an identification, (even tentative) of the defendant. The bank surveillance photo, though poor in quality, indicated no apparent effort at disguise by the participants. In addition to no identification, there was no evidence of bait money, fingerprints, vocal recognition or other objective evidence of defendant's participation other than his statement.

The statement itself, aside from the Fourth Amendment, was subject to certain infirmities as to its voluntary nature. Written in the hand of one of the FBI agents, it is difficult to read as admitted by the FBI agents (T. 779). In addition, there was a

great deal of questioning concerning defendant's handwritten acknowledgment that the statement was "...true in correct" (T. 775). As the evidence was posed, it became apparent that there could be a swamping effect from the bank surveillance photo on the question of the voluntary nature of the statement presented to the jury for their resolution.

Early in the government's case, defense counsel, although no objection was pending, called for a side bar conference to alert the court and prosecutor to a pattern of leading questions being established by the prosecutor (T. 257-258). Gilbert Robinson was called by the government and, after testifying that he knew Earl Harris (a severed co-defendant) and his brother, defendant Charles Harris, since 1967 (T. 391), the prosecutor proceeded to question Mr. Robinson as to the people he recognized in the photo. The subsequent objections and rulings of the court, together with the prosecutor's continued questioning on the subject are contained in app. pp. 28-33. It is clear now, and clear at the time of trial, that the questioning concerning the bank surveillance photos and the witness' recognition of

people therein, coupled with his previous testimony of knowing the defendant since 1967, was to establish the opinion of the witness as to the identity of Charles Harris as one of the participants when no one present at the scene could do so. It is hornbook law that the non-expert witness must testify to facts and not express opinions and the jury is as well qualified as the witness to draw inferences and conclusions. The subject of the bank surveillance photo came up again during the direct examination of Odell Cohens where objection was sustained and an admonishment was given to the prosecutor about exploring this issue (app. pp. 36-39).

Counsel for defendant recognizes the inherent stresses and strains within a trial. Under the circumstances, the term "prosecutorial misconduct" may seem harsh but surely the prejudice to the defendant is the same whether the questioning was intentional or not. The standard for measuring such conduct has been stated as follows:

"In deciding this question we must consider in the circumstances of this case, the degree of prejudice created in the minds of the

jurors by the demand, the quality and forcefulness of the trial judge's corrective action and the strength of the Government's case.

United States v. Pfingst, 477 F.2d 177,188 (2d Cir. 1973); United States v. Semensohn, 421 F.2d 1206, 1208-09 (2d Cir. 1970).

While opinion may differ as to the quality of the bank surveillance photo, it is certainly not of portrait quality and while its weight was a jury question, no one in the bank could identify defendant. It is not likely that the photo, unless bolstered, would point to defendant. It is possible of course that the defendant's statement, despite all its infirmities, could corroborate the photo. But the unresolved conundrum is whether the photo, bolstered by the questioning of Robinson, corroborated and resolved the voluntary problem of the statement. And that combination was the government's essential case against the defendant. The questioning of Robinson was not an

isolated incident but part of a continued pattern of posing leading questions. It was clearly not a minor thing which would wash out during a long and complex trial. Lutwak v. United States, 344 U.S. 604,619 (1953). While the court gave a curative instruction (app. p. 30) it is doubtful whether the continued attempt to back-door the identity of defendant through bank surveillance photo could cure the obvious prejudice. It may be curable if other witnesses had identified defendant as being in the bank or if there were other hard evidence (fingerprints, bait money, money traceable to bank, clothing identification, etc.)but none was forthcoming.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

DOCKET NO. 74-1193

---


UNITED STATES OF AMERICA  
PLAINTIFF-APPELLEE  
V.  
CHARLES HARRIS  
DEFENDANT-APPELLANT

---

CERTIFICATE OF SERVICE

---

I hereby certify that a copy of the Brief and Appendix of the defendant-appellant in the above matter was mailed, postage pre-paid, to Leander Gray, Esq., 361 Sherman Avenue, New Haven, Connecticut, Attorney for Ronald Catron, and Thomas F. Maxwell, Jr., Esq., Assistant United States Attorney, Bridgeport, Connecticut.

  
Thomas D. Clifford  
Federal Public Defender  
770 Chapel Street  
New Haven, Connecticut

CONCLUSION

Appellant respectfully asks this Court for the reasons stated herein to reverse the conviction on the indictment herein and to order a new trial.

CHARLES HARRIS  
THE APPELLANT

BY Thomas D. Clifford  
Thomas D. Clifford  
Federal Public Defender  
His Attorney  
770 Chapel Street  
New Haven, Connecticut